(3)

No. 06-1330

FILED
MAY 0 3 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

SANTA BARBARA BANK & TRUST, et al.,

Petitioners,

v.

CANIEVA HOOD AND CONGRESS OF CALIFORNIA SENIORS,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

OPPOSITION TO PETITION FOR CERTIORARI

JAMES C. STURDEVANT
(*Counsel of Record*)
MONIQUE OLIVIER
THE STURDEVANT LAW FIRM
475 Sansome Street, Suite 1750
San Francisco, CA 94111-3141
Telephone: (415) 477-2410
Facsimile: (415) 477-2420

STUART ROSSMAN
CHI CHI WU
CHARLES DELBAUM
THE NATIONAL CONSUMER LAW CENTER
77 Summer Street, 10th Floor
Boston, MA 02110
Telephone: (617) 542-8010
Facsimile: (617) 542-8028

Attorneys for Respondents
Canieva Hood and Congress of California Seniors

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	4
I. FACTUAL BACKGROUND	4
II. PROCEDURAL HISTORY	6
A. Proceedings in the Superior Court	6
B. The Decision of the Court of Appeal	8
REASONS FOR DENYING THE PETITION	10
I. THE COURT LACKS JURISDICTION TO REVIEW THIS INTERLOCUTORY STATE COURT ORDER COMPELLING ARBITRATION	10
A. The Decision Below Is Not Final and Appealable Under 28 U.S.C. § 1257(a)	10
B. The *Cox Broadcasting* Exceptions to Section 1257's Final Judgment Requirement Do Not Apply	11
II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT ON THE SPECIFIC ISSUE DECIDED BY THE COURT BELOW	13
A. There Is No Conflict With Respect to a Presumption Against Preemption	13
B. There Is No Conflict With Respect to the Issue of Deference to the OCC On the Issue Involved Here, Because the Lower Court Followed the OCC's Regulations	18
C. There Is No Split on the Issue of Visitorial Powers	21

TABLE OF CONTENTS – Continued

Page

III. THIS COURT NEED NOT REVIEW THIS CASE, AS THE COURT OF APPEAL'S DECISION IS ENTIRELY JUSTIFIED BY THE INDEPENDENT AND SUFFICIENT (AS WELL AS NONCONTROVERSIAL AND WIDELY ACCEPTED) RULE THAT STATE LAWS ARE NOT PREEMPTED WHERE THEY MERELY PROVIDE FOR THE ENFORCEMENT OF RULES INCLUDED IN OTHER FEDERAL LAWS 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES:

Atherton v. FDIC, 519 U.S. 213 (1997) 15, 18

Bank of America v. City & County of San Francisco, 309 F.3d 551 (9th Cir. 2002) 17

Bates v. Dow Agrosciences, 544 U.S. 431 (2005) 14, 26

California v. ARC America Corp., 490 U.S. 93 (1989) 14

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 18, 19

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 14

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2, 11, 12, 13

Deitrick v. Greaney, 309 U.S. 190 (1940) 23

Guthrie v. Harkness, 199 U.S. 148 (1905) 22, 23

Heredia v. Green, 667 F.2d 392 (3d Cir. 1981) 17

Irwin v. Mascott, 96 F.Supp.2d 968 (N.D. Cal. 1999) 16

Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997) .. 10, 11

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 15

Kroske v. U.S. Bank Corp., 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 157 (2006) 26

Market Street Ry. Co. v. Railroad Comm'n of Cal., 324 U.S. 548 (1945) 11

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 14

TABLE OF AUTHORITIES – Continued

Page

National Bank v. Commonwealth, 76 U.S. 353 (1869) 15

Office of the Comptroller of the Currency v. Spitzer, 396 F.Supp.2d 383 (S.D.N.Y. 2005) 24, 25

Payne v. National Collection Systems, Inc., 91 Cal.App.4th 1037 (2001) 25

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 11

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 14

Smiley v. Citibank, 900 P.2d 690 (Cal. 1995), *aff'd*, 517 U.S. 735 (1996) 16

United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) 23

Watters v. Wachovia Bank, N.A., 127 S.Ct. 1559 (2007) ..... *passim*

STATUTES:

12 U.S.C. § 481-83 22
§ 484, subd. (a) 22
§ 485 22
§ 486 22

Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1601, et seq 16

15 U.S.C. § 1692n 16

28 U.S.C. § 1257(a) 2, 10, 11, 12

California Business and Professions Code § 17200 17

California Unfair Competition Law 16, 25

TABLE OF AUTHORITIES – Continued

Page

Rosenthal Fair Debt Collection Practices Act 26

Cal. Ed. Code § 94180 24

Ind. Code Ann., § 28-11-3-2 24

REGULATIONS:

12 C.F.R. § 7.4000 21

12 C.F.R. §§ 7.4007(c)(1), (2), (4) 8

12 C.F.R. §§ 7.4008(e)(1), (2), (4) 8

Bank Activities and Operations
69 Fed. Reg. 1895, 1899,
2004 WL 50762 (Jan. 13, 2004) 21, 25

LEGISLATIVE HISTORY:

H.R. Rep. No. 95-131, 95th Cong., 1st Sess., 7, 8 (1977) 17

OTHER AUTHORITIES:

Black's Law Dict. (7th ed.) at p. 1567 24

Office of the Comptroller of the Currency, "About the OCC," available at http://www.occ.treas.gov/aboutocc.htm 23

INTRODUCTION

The Petition addresses a non-final state court decision that interprets the text of a regulation of the Office of the Comptroller of Currency ("OCC"). The Petition does not cite to a single decision of any court in the country that disagrees with that interpretation. Indeed, Petitioner does not cite (and Respondents do not know of) any application of this regulation to a situation that approaches the situation posed by the factual allegations of this case.

To fill the void created by the lack of any conflict in this area, Petitioner characterizes this case as posing central issues at the heart of national banking law. Petitioner relies heavily upon this Court's recent decision in *Watters v. Wachovia Bank, N.A.*, 127 S.Ct. 1559 (2007), which Petitioner argues demonstrates that national law "regulates [the national banks'] core banking activities." [Petitioner's Supplemental Brief at 5.] Petitioner also argues that *Watters* demonstrates that national banks' banking activities are "controlled" by the regulations of the OCC. [Petitioner's Supplemental Brief at 3.] The problems with this approach, which are downplayed to the point of invisibility in the Petition, are that (a) the conduct involved here involves third party debt collection, not lending activity, and thus plainly is not a "core banking activity" of the sort addressed in *Watters*; and (b) the decision of the court below rests upon the express language of an OCC regulation providing that state law governs debt collection activities, and (unlike *Watters*) this case does not involve a frontal attack upon the validity of the OCC's regulations.

This Court should deny the Petition for three reasons. First, the Court does not have jurisdiction over this case.

The ruling below denying a motion to dismiss is not a final judgment under 28 U.S.C. § 1257(a), and this case does not fall within any of the four exceptions to the final judgment rule recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Second, there is no conflict between the decision below and any other court on the issue decided by the lower court. This case is not about banking. It does not involve lending, deposit-taking, or any traditional banking activity. What it does involve is a national bank engaged in third party debt collection on behalf of other banks. This case concerns Santa Barbara Bank & Trust's ("SBBT") agreements with a number of other lenders to collect each other's alleged debts. Under these agreements, whenever one of SBBT's potential customers is discovered to allegedly owe money to another lender relating to a Refund Anticipation Loan ("RAL") that lender previously made to the customer, SBBT denies the loan application (regardless of whether the customer otherwise would qualify for such a loan), seizes monies from the customer's tax refund, and sends those monies to the other lender. In other words, with respect to the business practices involved in this lawsuit, SBBT is not engaged in any form of banking, but in collecting alleged debts for others without notice or judicial process.

In this case, the California Court of Appeal was asked whether federal law (in the form of the regulations of the OCC) preempts California laws of general application governing abusive debt collection as those laws would apply to a national bank engaged in the non-banking activity of third party debt collection. As the Court of Appeal noted, the OCC's regulations contain a "savings clause" which explicitly provides that those regulations do

not preempt state laws relating to debt collection unless those laws more than incidentally affect the business of banking (e.g., deposit-taking or lending). [Pet. App. 14a.] The case law explains that state laws only more than incidentally affect the business of banking if they are aimed at that business in particular. Because the state laws at issue here – including California's laws which prohibit misleading communications relating to debt collection – apply to all businesses, the court below held that the state laws at issue here are clearly covered by the "savings clause." Petitioners point to no federal court of appeals, no state high court, and, indeed, no court of any sort, that has disagreed with the holding of the Court below with respect to this savings clause and state law claims of the sort raised here.

Third, there is no conflict between the decision below and the decisions of this Court. Petitioner attempts to invoke broad themes of deference to administrative agencies and presumptions, but none of those themes is essential to the narrow issue decided. The Court of Appeal's decision holding that California's general state laws dealing with debt collection are not preempted by the OCC's regulations, is a straightforward and correct reading and application of the OCC's savings clause. As such, the Court of Appeal's holding does not depend upon the answer to any of the "controversial" policy questions posed in the Petition about the nature of deference to administrative agencies and whether there is a presumption against preemption of state laws that regulate lending (as opposed to non-lending activities such as third party debt collection).

The decision below also rests on an independent ground that does not relate to either the issues of the

deference to agencies or the presumption against preemption. The Court of Appeal also held that the California laws governing abusive debt collection at issue here are not preempted because they are entirely consistent with, and merely offer another means of enforcing, federal laws that also govern debt collection. [Pet. App. 24a-25a.] In light of this confluence of federal and state law, the issues addressed in the Petition, are not essential to the holding below.

When this Court focuses upon the narrow issues actually decided by the Court of Appeal in this case, as opposed to the phantom global issues raised in the Petition, it will become clear that review is inappropriate and unnecessary.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Jackson Hewitt, Inc. and its affiliates, Cendant Corporation and Tax Services of America (hereafter collectively "Jackson Hewitt") market and sell tax preparation services to consumers. Many low income taxpayers who receive the earned income tax credit seek assistance preparing their returns from tax preparation services. Jackson Hewitt partners with SBBT, which then offers RALs to these consumers. RALs are short-term, high-interest loans based upon the amount of a person's anticipated tax refund. In 2002, SBBT charged an annual percentage rate ranging from 59.35% to 405.58% for RALs. [Pet. App. 3a.]

RALs have often been advertised as "rapid refunds" or as a way to obtain a tax refund quickly. As a result, many taxpayers do not understand that RALs are, in fact, loans, secured by a pledge of an individual's tax refund, which the individual must pay back if the tax refund does not come through. To recover RALs that are unpaid, SBBT participates in agreements with other banks that make RALs to collect each other's outstanding RAL debts – arising from previously granted RAL loans – from RAL applicants (cross-collection agreements). To this end, SBBT and other RAL lenders insert a provision in RAL applications which purports to authorize this debt collection (cross-collection provision). Acting pursuant to their cross-collection agreements, the banks then collect each other's debts by denying RAL applications of persons with alleged prior RAL debt and seizing their tax refunds to pay the debt. Not surprisingly, customers often do not understand that they are applying for a high-interest loan, and that they also are signing a document permitting the lenders to deny their RAL applications and then seize their refunds to pay alleged third-party debts. [Pet. App. 81a-82a.]

Plaintiff and Respondent Hood is a taxpayer who has received the earned income tax credit for several years. On January 31, 2002, Hood went to a Jackson Hewitt Tax Service office for assistance in preparing and filing her income tax return. A Jackson Hewitt employee told Hood that she had two options for a quick refund: a "rapid refund" that she could receive the next day, or another refund that she could get in 48 hours. Hood selected the option for payment within 48 hours. The Jackson Hewitt employee did not explain that these options were loans or, that in seeking a quick refund, she would agree to allow

SBBT to seize her refund to repay any alleged outstanding RAL debts that she had with another lender.

The Jackson Hewitt employee asked Hood to sign and initial a set of documents, which included an application from SBBT for an RAL. Hood was also asked to sign a document authorizing the United States Treasury to electronically transmit her tax refund into a deposit account at SBBT. Hood was not given an opportunity to read the documents. The RAL application consists of four pages, each containing two columns of very fine, single-spaced text. The cross-collection provision is buried on the second and third pages of the application.

SBBT sent Hood a letter dated February 3, 2002, stating that her RAL was denied because Santa Barbara had "been informed of an outstanding [RAL] debt with [Household Bank]." Hood, who expected a refund of over $2,000, never received her refund or an RAL. Instead, SBBT seized her entire refund to pay an alleged debt Hood owed to Household Bank.

II. PROCEDURAL HISTORY.

A. Proceedings in the Superior Court.

In March 2003, plaintiffs filed their initial complaint seeking damages and other relief for the tort of conversion and for violations of state laws that prohibit abusive debt collection practices. The Court of Appeal provided a detailed, accurate summary of plaintiffs' claims in its decision. [Pet. App. 15a-17a.] The proposed plaintiff class is composed of all persons who at anytime from March 18, 1999 forward have had or will have their tax refunds

seized by SBBT as a result of the RAL procedures and collection methods challenged in the complaint.

The action was transferred to Santa Barbara Superior Court on March 15, 2004. Defendants demurred to the Third Amended Complaint on multiple grounds. The court overruled the demurrers (except as to one cause of action against Jackson Hewitt and another cause of action against Cendant and Tax Services of America).[1]

After the trial court overruled the demurrers, SBBT filed a cross-complaint seeking indemnity from other cross-collection agreement participants: Household Bank, F.S.B.; Beneficial National Bank; Household Tax Masters, Inc.; Bank One, N.A.; Republic First Bank; Republic Bank & Trust, River City Bank; First Bank of Delaware; and First Security Bank of Mackinaw, IL. SBBT and cross-defendants then filed a motion for judgment on the pleadings or, in the

---

[1] In its order overruling the demurrer, the Superior Court made a number of important rulings:

- "Plaintiffs have sufficiently alleged facts demonstrating that a consumer would likely be deceived with respect to the characteristics of the services offered." [Decision and Order on Defendants' Demurrers and Motion to Strike ("Order") at 7:14-16.]
- "Plaintiff[s] sufficiently allege[ ] that Defendants failed to inform consumers that SBBT would engage in debt collection practices during the loan application and approval process in violation of Civil Code § 1788.13(I) (false representation of true nature of business or services being rendered by the debt collector) and failed to provide debt collection notices required by law." [Order at 8:4-8.]
- "Plaintiffs have sufficiently pled violation[s] of the UCL with respect to all Defendants based upon unfair and fraudulent business practices." [Order at 9:4-5.]

alternative, for summary adjudication based solely on the affirmative defense of preemption.

On May 18, 2005, the trial court granted the motion for judgment on the pleadings.[2] Plaintiffs filed a timely notice of appeal on July 11, 2005.

B. The Decision of the Court of Appeal.

The Court of Appeal reversed. The majority opinion held that the OCC's regulations do not preempt plaintiffs' state law claims. First, the Court examined the OCC's deposit-taking and lending regulations that expressly save from preemption state contract, tort, and debt collection laws that only incidentally affect the exercise of national banks' deposit-taking or non-real estate lending powers. [Pet. App. 20a, citing 12 C.F.R. §§ 7.4007(c)(1), (2), (4), 7.4008(e)(1), (2), (4).] The Court found that the state laws upon which plaintiffs' claims are based do not more than incidentally affect the banks' powers. [Pet. App. 20a-21a.]

Second, the Court of Appeal concluded that there is no preemption of plaintiffs' claims that seek to redress violations of state statutes that contain federal standards. [Pet. App. 25a.]

Third, the Court of Appeal correctly rejected the trial court's conclusion that the OCC's lending regulation encompassed the national banks' ability to require cross-collection provisions as a "risk mitigant" or "term of credit"

---

[2] The Court denied as moot the motion for summary adjudication, specifically noting that it did not consider or rely upon any of the evidence that SBBT and cross-defendants submitted in support of the motion. [Pet. App. 36a.]

and therefore expressly preempted plaintiffs' state law claims. The Court found that the trial court's ruling gave an impermissibly expansive interpretation to the phrase "risk mitigant" allowed under the regulation:

> The ruling enforced a risk mitigant (or term of credit) against Hood and in favor of respondents, including Santa Barbara, in a transaction where Santa Barbara extended no credit to Hood. Santa Barbara's seizure of Hood's 2001 tax refund alleviated a risk incurred by a *third party* (Household Bank) under a preexisting transaction. The trial court thus applied the non-real estate lending regulation to a transaction where Santa Barbara made no loan and incurred no risk.

[Pet. App. 26a (emphasis added).]

The Court also determined that the non-real estate lending regulation could not apply in this context where Santa Barbara "has no lending relationship" with plaintiffs. [Pet. App. 27a.] Accordingly, the Court concluded that plaintiffs' claims "are outside the scope of the non-real estate lending regulation." [*Id.*] In so holding, the Court noted that it did not need to, as defendants insisted, "defer to the OCC's finding that national banks may participate in RAL cross-collection programs," because there is nothing in the OCC regulations that purports to condone the use of cross-collection provisions against consumers where a "lender" extends no credit to the consumer and seizes the consumer's refund to pay the proceeds to a third-party lender. [Pet. App. 28a-29a.]

Finally, the Court found that the visitorial powers doctrine does not preempt plaintiffs' claims because private parties' actions are not visitations. Citing a line of cases from around the nation, the Court correctly

concluded that the historic doctrine "applies to government actions" and not to actions by private parties for financial losses as well as declaratory and injunctive relief under the private attorneys general statute. [Pet. App. 19a.] The Court rejected the argument advanced by Petitioners that plaintiffs' action is "fundamentally regulatory," finding that plaintiffs' action "does not interfere with what respondents may do or how they may operate their banking business. Put another way, while the state cannot dictate to respondents how they can or cannot operate, it can insist that, however respondents choose to operate, they do so without violating debt collection laws and using deceptive business practices." [Pet. App. 19a.]

Petitioners sought review from the California Supreme Court, but that petition was denied.

REASONS FOR DENYING THE PETITION

I. THE COURT LACKS JURISDICTION TO REVIEW THIS INTERLOCUTORY STATE COURT ORDER COMPELLING ARBITRATION.

A. The Decision Below Is Not Final and Appealable Under 28 U.S.C. § 1257(a).

This Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . " 28 U.S.C. § 1257(a). Section 1257(a) establishes a "firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 81 (1997). To be reviewable by this court, a State-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation

and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). This means that a state court's decision must be "final as an effective determination of the litigation and not merely of interlocutory or intermediate steps therein." *Id.* Section 1257's requirement of finality "'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Here, since the California Court of Appeal did not issue a final judgment or decree, its decision is not yet appealable.

The Court of Appeal revised the grant of a motion for judgment on the pleadings and remanded to the trial court for further proceedings. Its opinion certainly is not final as an "effective determination of the litigation." *Jefferson*, 522 U.S. at 81. The decision below revising the grant of a motion for judgment on the pleadings is interlocutory and non-appealable under § 1257(a).

B. The *Cox Broadcasting* Exceptions to Section 1257's Final Judgment Requirement Do Not Apply.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court recognized four circumstances that may permit review of state court decisions prior to a final judgment. The first involves cases where "there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. Second are cases in which "the federal issue, finally decided by the highest court in the State, will

survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. Third are cases where "the federal claim has been finally decided with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. The fourth and final exception arises where (a) "the federal issue has been finally decided in the state courts . . . and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action;" *and* (b) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-83. None of these exceptions to § 1257(a)'s final-judgment rule applies here.

The first three *Cox Broadcasting* exceptions clearly do not apply because all claims and defenses on the merits are yet to be resolved, and thus could be subject to later appeals. This is not a case where "the federal issue is conclusive" in further proceedings or the outcome of these proceedings is "preordained," 420 U.S. at 479, because either party could still prevail on its unresolved merits claims or defenses. The first exception thus does not apply. Nor does the second exception apply since, if Ms. Hood fails to prove her state-law claims or Petitioners prevailed on a merits defense, the federal question asserted here would not "survive and require decision." *Id.* at 480. Likewise, the third exception does not apply because there is no state-law bar to a later appeal by any party, as there is in many criminal cases, *id.* at 481, in the event of an adverse judgment. Petitioners could appeal if Ms. Hood prevailed at trial. The first three *Cox Broadcasting* exceptions to § 1257(a)'s final judgment rule plainly do not apply.

Finally, the fourth *Cox Broadcasting* exception likewise does not apply here because this is not a case where "a refusal to review the state-court decision might seriously erode federal policy." *Id.* at 483. As Part III of this Opposition establishes, the only federal policy relating to the preemptive scope of the OCC's regulation is a policy relating to lending. This case, by contrast, involves debt collection, not lending. No immediate action by this Court is necessary to preserve a central federal interest of the OCC's regulations (as demonstrated by the presence of the Savings Clause in the regulations preserving state laws of the sort involved in this case).

In sum, this case presents no basis to depart from § 1257(a)'s imposition of a "firm final judgment rule." The Court thus lacks jurisdiction, and the petition should be denied.

II. THIS COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO CONFLICT ON THE SPECIFIC ISSUE DECIDED BY THE COURT BELOW.

A. There Is No Conflict With Respect to a Presumption Against Preemption.

The Petition argues that the decision below conflicts with other decisions holding that there is no presumption against preemption in cites to cases involving lending activity, but cites to no cases, however, involving debt collection activity by banks. The Petition thus compares apples and oranges, or perhaps the comparison is even further afield, such as apples to ball bearings.

The question of which circumstances should direct a court to begin its analysis of a federal preemption issue

with a presumption against the preemption of state law depends entirely upon the context of the laws involved. The Court of Appeal's opinion correctly notes that the context is decisive – there are certain settings involving national banks where the presumption against preemption does apply, and other settings where it does not. The Petition ignores the question of context, blurring two very different situations in order to erroneously suggest that the Court of Appeal's decision creates disuniformity in the law.

When Congress legislates in a field traditionally occupied by the states in furtherance of their historic police powers, there is a presumption *against* finding federal preemption. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *see also Bates v. Dow Agrosciences*, 544 U.S. 431, 449 (2005) (citations omitted) ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'")) In *Bates*, this Court stated that when there are two equally plausible readings of a federal statute (or regulation, presumably), courts should adopt the reading that would find no preemption of state law. *Bates*, 544 U.S. at 449.

Put another way, "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This presumption applies both to the existence and scope of preemption, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and serves the purpose of assuring that "the federal-state balance" will not be disturbed unintentionally

by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Nonetheless, as the Court of Appeal noted below, there are some circumstances where the historic and constitutional presumption against preemption does not apply, and this is sometimes true with respect to the regulation of banks. Rather than looking at the properly nuanced law enunciated by the Court of Appeal, Petitioners conflate lending activity with debt collection activity, in order to manufacture a conflict. Petitioners would essentially like this Court to create an unqualified new rule of law amounting to the proposition that "there is never a presumption against preemption with respect to any state law that relates to any activity a national bank may engage in, whether that activity is lending activity or not." Petitioners cite to no case that would support such a sweeping rule, however, and Respondents know of no such case.

To the contrary, the Court of Appeal's decision is consistent with a line of cases that follow this Court's decision. While there are certain circumstances where there is not a presumption against preemption of some state laws, those circumstances do not extend to the setting involved here. The protection of consumers against abusive debt collection practices is a traditional area of state regulation. There are two decisions of this Court that explicitly state that the regulation of debt collection by national banks is generally a matter of state law. See *Atherton v. FDIC*, 519 U.S. 213, 222-223 (1997) (the "right to collect . . . debts" of national banks is "based on State law"), citing *National Bank v. Commonwealth*, 76 U.S. 353, 361 (1869). The *Atherton* case was cited with approval by this Court in *Watters*, 127 S.Ct. at 1566, and this Court gave no indication that it was overturning its earlier

statements that debt collection by national banks (as opposed to the lending activities involved in *Watters*) was governed by state law. Petitioner cherry picks from *Watters* language that relates to the lack of a presumption against preemption for certain types of banking activities, while ignoring the portions of *Watters* that leave untouched this Court's more specific guidance that there is a presumption against preemption with respect to debt collection.

This Court has held in cases involving national banks that the presumption against preemption applies when the issues involved concern state laws of general application. *See, e.g., Smiley v. Citibank (S.D.), N.A.*, 900 P.2d 690 (Cal. 1995), *aff'd*, 517 U.S. 735 (1996) (presumption against preemption of historic police powers of the states which "extend to consumer protection").

Petitioner refuses to acknowledge the distinction between lending and debt collection, and ignores the federal statute governing the latter topic. In fact, the Congress has acknowledged that debt collection is principally governed by state laws. This is established by the Federal Fair Debt Collection Practices Act, 15 U.S.C. Section 1601, et seq. (FDCPA), which specifically provides that "[f]or purposes of this section, a state law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter." 15 U.S.C. § 1692n. In particular, courts specifically have held that the FDCPA does not preempt California's Unfair Competition Law (which lies behind plaintiff's claim here) to the extent that the state statute provides for greater protection for consumers than federal law. See *Irwin v. Mascott*, 96 F.Supp.2d 968, 974 (N.D. Cal. 1999) (the FDCPA does not preempt state

laws, such as the Business and Professional Code section 17200, that regulate debtor/creditor relationships and provide greater protections from debt collectors than the FDCPA); see also *Heredia v. Green*, 667 F.2d 392, 397-398 (3d Cir. 1981), citing H.R. Rep. No. 95-131, 95th Cong., 1st Sess., 7, 8 (1977) (noting that the legislative history of the FDCPA recognizes importance of state law in battling abusive debt collection practices). In short, both Congress and the courts have recognized that it is a traditional responsibility of state law to protect consumers against abusive and deceptive debt collection practices. Accordingly, under the decisions of this Court, there is a heavy presumption against finding that these state laws are preempted by federal law.

Unlike Petitioner's open-ended approach to a presumption against preemption, the lower courts have followed this Court in recognizing that debt collection by banks is an exception where state law is ascendent. The lower court cited to a Ninth Circuit decision to note that there is not a general presumption against preemption in the field of banking when a case involves laws that target banks or seek to regulate banking. [Pet. App. 11a (citing *Bank of America v. City & County of San Francisco*, 309 F.3d 551, 558-559 (9th Cir. 2002)).] On the other hand, the Court below noted, it is still appropriate to apply a presumption against banking with respect to state laws of general application that are not targeted at banks. [Pet. App. 11a-12a.]

As the Court of Appeal recognized, this case does not involve traditional areas of banking. The Court stated, "Santa Barbara has no lending relationship with [plaintiffs]." [Pet. App. 27a.] To the contrary, the case involves debt collection, tort, contract and consumer protection,

areas of law traditionally reserved to the states. [Pet. App. 3a (case involves defendants' "agreements with other banks to collect outstanding RAL debts . . . ").]

In keeping with this Court's decision in *Atherton*, cited with approval in *Watters*, the Court below correctly held "[f]ederal courts recognize that national banks and federally regulated thrift organizations are subject to state laws governing debt collection." [Pet. App. 21a (citations omitted).] The Court of Appeal, therefore, correctly recognized that one size does not fit all when it comes to a presumption against preemption. It is appropriate to apply a presumption in some settings, and not in others. A presumption against preemption is appropriate where, as here, the laws at issue are laws of general application involving areas such as debt collection traditionally reserved to the states to enforce.

B. There Is No Conflict With Respect to the Issue of Deference to the OCC On the Issue Involved Here, Because the Lower Court Followed the OCC's Regulations.

Petitioners assert that this Court should grant review because the Court of Appeal "refused to accord the OCC the deference normally given federal agencies under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." [Petition at 16.] It is clear, however, that the Court of Appeal's conclusion that plaintiffs' state law claims are not preempted is, in fact, entirely consistent with and, indeed, compelled by the OCC regulations. It is Petitioners, not plaintiffs, who are at war with the OCC's regulations. In its effort to escape from the consequences of serially violating California's laws protecting against the unfair and abusive collection of debts,

Petitioners may wish that the OCC had not exempted from federal preemption state laws dealing with debt collection. As it happens, however, the OCC *did* explicitly draft regulations that exempt this body of state law from federal preemption. By recognizing and applying this specific and directly applicable federal regulation, the Court of Appeal followed the directions of the OCC. This is not a case where the Court of Appeal has chosen to disregard the regulatory structure set forth by the OCC, but rather a case where Petitioners would like this Court to re-write and re-work that structure. Accordingly, the application of *Chevron* deference is not an issue that calls for review by this Court.

The Petition also suggested that the issue of deference to the OCC would likely be informed by this Court's decision in *Watters*. In *Watters*, however, this Court did not reach the issue of deference to agencies. *See Watters*, 127 S.Ct. at 1527 n. 13. In any case, *Watters* is inapposite here, because (a) the state laws at issue in *Watters* are directly aimed at mortgage lending practices undertaken by "operating subsidiaries" of national banks, not at non-banking activities such as debt collection; and (b) there was no dispute that the state law at issue in *Watters* violates the OCC regulations, the only dispute was whether those OCC regulations are valid. This case, by contrast, involves contract, tort and debt collection. [Pet. App. 3a (case involves defendants' "agreements with other banks to collect outstanding RAL debts. . . .").] Unlike the frontal attack upon the OCC regulations attempted by Michigan in *Watters*, the Court of Appeal decision here was based upon respondents' argument that their causes of action fall within the express statements in the OCC regulations that provide that state laws involving contract,

tort and debt collection are saved or exempt from preemption. [Pet. App. 14a (citing these "savings clauses" or "catch-all" provisions).] Similarly, plaintiffs argue that, even were their claims not explicitly within the very specific exemption from preemption in the OCC regulations for debt collection, their claims nonetheless do not fall within the express preemption provisions of the OCC regulations. The Court of Appeal's acceptance of these language-based arguments [see Pet. App. 27a (plaintiffs' claims "are outside the scope of preemption encompassed by the non-real estate lending regulation")] stands entirely apart from Michigan's argument in *Watters* that the OCC regulations themselves were illegal.

It is true, as defendants note, that the Court of Appeal commented that administrative agencies are entitled to limited deference "concerning areas within their expertise." [Pet. App. 28a.] But taken as a whole, it is clear that the Court of Appeal based its decision upon the language of the OCC's regulations and the absence of any indication that the OCC approved of the practices at issue in this case. Far from being at war with the OCC, the Court's opinion is entirely consistent with the OCC's positions. The opinion does not criticize the OCC in any way, but instead cites OCC's statements with approval. [E.g., Pet. App. 23a (footnote omitted) ("The OCC has recognized that the UCL applies to national banks").] The decision in this case agrees with and implements the language of the OCC regulations, which explicitly preserves state laws regulating the business of debt collection (as opposed to lending).

C. There Is No Split on the Issue of Visitorial Powers.

The Court of Appeal held correctly and unremarkably that the visitorial powers doctrine does not apply to lawsuits between private litigants. This conclusion is directly in line with numerous courts to have considered the issue. Under Petitioners' sweeping theory, national banks are exempt from essentially all private class action lawsuits (such as those that have been brought or may be brought under the CLRA, the UCL and the FAA), because, in their unsupported view, this "litigation has a fundamentally regulatory character. . . ." This unsupportable theory was properly rejected by the Court of Appeal in this case, as many other courts have in other cases.

As an initial matter, plaintiffs' claims are not barred by federal preemption under the "visitorial powers" theory for the same reasons that preemption does not lie under the other arguments addressed above: (1) this case does not involve either loan-making or deposit-taking; and (2) the OCC regulations expressly preserve state laws relating to debt collection and deceptive statements from federal preemption. The language of 12 C.F.R. section 7.4000 makes clear that it only applies to deposit-taking and loan-making activities. As the foregoing discussion establishes, this case does not relate to either subject. Thus "visitorial powers" cannot be an independent ground of federal preemption.

Even if the activities could be said to come within the deposit-taking or lending functions, the OCC itself has directed that "the use of the courts for private civil cases" phrase in the NBA does not constitute an exercise of visitorial powers. Bank Activities and Operations, 69 Fed.

Reg. 1895, 1899, 2004 WL 50762 (Jan. 13, 2004). The term "visitorial powers" refers to the power of the OCC to "visit" a national bank to examine its activities and its observance of, and conformity to, applicable laws. The visitorial powers that are within the exclusive province of the OCC are the powers to conduct examinations of banks to determine compliance with banking laws to ensure banks' safety and soundness.

That Congress intended "visitorial powers" to mean the power to conduct such examinations is evident from the context of Section 484. That section is codified in a subchapter entitled "Bank Examinations." 12 U.S.C. § 484, subd. (a), *codified* in Subchapter XV of Title 12 of the United States Code. The provisions surrounding Section 484 address such technical issues as appointment and payment of examiners, special examinations, and waiver of examination requirements. 12 U.S.C. §§ 481-83, 485, 486.

The decisions of this Court are in accord. In *Watters*, this Court explained the meaning of the phrase "visitorial powers": the "Act vests visitorial oversight in OCC, not state regulators." 127 S.Ct. at 1572. The Court explained that the concern of the act was with the interference of "state regulators," and "multiple audits . . . and rival oversight regimes." 127 S.Ct. at 1573. The language and approach is purely aimed at state governmental oversight, not private lawsuits of the sort brought here.

In *Guthrie v. Harkness*, 199 U.S. 148 (1905), similarly, the Court interpreted visitation, as used in the predecessor to Section 484, to mean "the act of a superior or superintending officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance

of its laws and regulations." *Id.* at 158 (citation omitted). In *Guthrie*, the Court noted that, while a national bank is a public institution subject to examination by the OCC, it is owned by shareholders and "it is subject by statute to be sued in the courts of the state." *Id.* at 157 (holding that shareholder suit to enforce common law right to compel inspection of books and records was not exercise of visitorial powers).

This Court has confirmed that "[t]he provisions of the Act requiring periodic examinations and reports and the powers of the Comptroller are designed to insure prompt discovery of violations of the [National Bank] Act and in that event prompt remedial action by the Comptroller." *Deitrick v. Greaney*, 309 U.S. 190, 195 (1940).[3] Through visitorial powers, "[w]henever the agencies deem it necessary, they may order 'a thorough examination of all the affairs of the bank,' . . . " *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 329 (1963).[4]

---

[3] Indeed, as the OCC describes its function,

> National bank examiners supervise domestic and international activities of national banks and perform corporate analyses. Examiners analyze a bank's loan and investment portfolios, funds management, capital, earnings, liquidity, sensitivity to market risk, and compliance with consumer banking laws, including the Community Reinvestment Act. They review the bank's internal controls, internal and external audit, and compliance with law. They also evaluate bank management's ability to identify and control risk.

("About the OCC, The Office of the Comptroller of the Currency" available at http://www.occ.treas.gov/aboutocc.htm, last visited April 27, 2007.)

[4] The state banking examiner possesses similar powers with respect to state chartered financial institutions. The phrase "visitorial powers," meaning the power to conduct this type of examination of an

(Continued on following page)

The concept of "visitorial powers" has rarely, if ever, been interpreted, however, to displace the power of federal and state courts to consider justiciable claims brought by private litigants to enforce the allegiance of a national bank to applicable state law. Indeed, a federal court in New York recently adopted the OCC's own interpretation of its visitorial powers authority and held that this power does not extend to suits by private parties:

> [T]he Attorney General cites several cases that he contends either explicitly or implicitly recognize the right of states to enforce their non-preempted laws against national banks. Each of these cases are inapposite, however as some involve private plaintiffs who do not themselves possess any visitorial authority.

Office of the Comptroller of the Currency v. Spitzer, 396 F.Supp.2d 383, 397 (S.D.N.Y. 2005). The Court went on to explain: The OCC's regulation bars states, not private parties, from enforcing laws against national banks, and it bars states from enforcing only those laws regulating the

---

organization's affairs, has been used in state legislation in California and across the country. See, e.g., Cal. Ed. Code, § 94180 [in article entitled "Examination and Visitorial Power of the State," providing that "[t]he State Controller . . . [is] hereby authorized and empowered from time to time to examine the accounts and books of the [California Educational Facilities Authority], including its receipts, disbursements, contracts, sinking funds, investments and any other matters relating to its financial standing"; Ind. Code Ann., § 28-11-3-2 [in chapter entitled "Supervision of Financial Institutions," providing that the state's Department of Financial Institutions "has visitorial powers with respect to any financial institution for the purpose of maintaining the safety and soundness of the financial institution"]. (See also, Black's Law Dict. (7th ed.) at p. 1567 [defining "visitorial" as "of or relating to on-site inspection or supervision"].

content and conduct of federally authorized banking activities against national banks. *Id.* at 401.

Moreover, as the Court of Appeal correctly held, this action is not transformed into a public action because it contains private attorney general allegations. The filing of an action Under California's Unfair Competition Law by a private plaintiff does not confer on that plaintiff the stature of a prosecuting officer. See, e.g., *Payne v. National Collection Systems, Inc.*, 91 Cal.App.4th 1037, 1045 (2001) (UCL claim brought by a public prosecutor is "fundamentally different" from a class or representative action and is not res judicata). Put simply, plaintiffs are not state officials; they are private litigants. The OCC has explicitly recognized the distinction, noting that "the use of the courts for private civil cases" does not amount to visitations or the exercise of visitorial powers. Bank Activities and Operations, 69 Fed. Reg. 1895, 1899, 2004 WL 50762 (Jan. 13, 2004).

The Court of Appeal correctly held that the visitorial powers doctrine does not apply to plaintiffs' action.

III. THIS COURT NEED NOT REVIEW THIS CASE, AS THE COURT OF APPEAL'S DECISION IS ENTIRELY JUSTIFIED BY THE INDEPENDENT AND SUFFICIENT (AS WELL AS NON-CONTROVERSIAL AND WIDELY ACCEPTED) RULE THAT STATE LAWS ARE NOT PREEMPTED WHERE THEY MERELY PROVIDE FOR THE ENFORCEMENT OF RULES INCLUDED IN OTHER FEDERAL LAWS.

The Petition does not justify this Court's review for another reason: the Court of Appeal's decision is a

straightforward application of the normal rule that state laws will not be preempted when they address conduct that also violates federal law. As the Court of Appeal explained in some detail, the claims in this case "seek to redress the violation of federal standards that have been adopted as part of California law." [Pet. App. 22a.] The Court's point is evident from a simple comparison of the nature of the allegations in the complaint and the Fair Debt Collection Practices Act.

The fact that the plaintiffs' claims seek to redress violations of federal standards is decisive, as the Court of Appeal explained, because:

> Here, appellants' CLRA, UCL, and Rosenthal Fair Debt Collection Practices Act's causes of action allege facts that would support a cause of action based on violations of federal law that apply to respondents regardless of state law. Thus, those causes of action are not preempted because they do not impose any substantial limitations upon, or "obstruct, impair or condition" a bank's actions.

[Pet. App. 25a.]

The Court of Appeal's ruling on this point is entirely consistent with the decisions of a variety of courts, and is hardly controversial. *See, e.g., Bates*, 544 U.S. at 448 ("a state cause of action that seeks to enforce a federal requirement 'does not impose a requirement that is "different from, or in addition to," requirements under federal law.'") (citation omitted); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976 (9th Cir. 2005), *cert. denied*, 127 S.Ct. 157 (2006).

For all of Petitioners' inflamed rhetoric about the absolute primacy of federal law, defendants never explain

why this Court need revisit yet again the well-established principle that where – as here – a body of state law closely tracks and merely enforces a set of rules also set forth in federal law, those state laws are not subject to federal preemption.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: May 4, 2007

Respectfully submitted,

JAMES C. STURDEVANT
(*Counsel of Record*)
MONIQUE OLIVIER
THE STURDEVANT LAW FIRM
475 Sansome Street, Suite 1750
San Francisco, CA 94111-3141
Telephone: (415) 477-2410

STUART ROSSMAN
CHI CHI WU
CHARLES DELBAUM
THE NATIONAL CONSUMER
LAW CENTER
77 Summer Street, 10th Floor
Boston, MA 02110
Telephone: (617) 542-8010

Attorneys for Respondents
Canieva Hood and Congress of California Seniors